No. 2674

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY (a corporation),
Plaintiff in Error,

vs.

SAMSON IRON WORKS (a corporation),
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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We consider the statement of the case in appellant's brief as faulty in many particulars. It is really not a statement of the case before this Court, but is an argumentative discussion of the facts as though they were being presented to a jury. It also, in many places, alleges that "they were proved without contradiction," in which respect appellant is mistaken. It concludes (p. 16):

> "The foregoing statement of facts does not reflect a partisan view of the record. It is a fair presentation of the uncontradicted evidence by which the jury were necessarily bound in their deliberations."

With this statement we take issue.

But for the purpose of the present argument it will be unnecessary to follow the appellant in the details of what

he calls his "Statement of the Case," as we do not think that the judgment of the Court can possibly turn upon any such questions of fact. There is sufficient conflict of evidence upon the real issues in the cause to make the verdict of the jury conclusive upon all questions of fact, even though we were to ignore the rule that the jury is not bound to believe the testimony of any particular witness, but might disregard his testimony for reasons satisfactory to themselves. They saw the witnesses, and heard the testimony, and as instructed by the lower Court,

> "The appearance upon the witness stand of living witnesses * * * * is an element of exceeding value in determining the degree of credibility that will be accorded to the particular evidence." (p. 188.)

So, too, with respect to the evidence submitted by depositions. As said by the lower Court (Rec. p. 188), it was the province of the jury to pass upon it, and in so doing, to apply its "judgment and reason in saying how far the evidence of any particular witness thus submitted is reasonable in its nature, how far it comports with the other evidence in the case which (the jury) are inclined to believe and thus (to) make up (its) mind as to what the facts are."

The jury were really called upon

> "To determine the issues as to which one of these parties was guilty of culpability, which resulted in the failure to carry out this contract. And really that is the whole sum and substance of this case, one or the other of these two parties failed to come up to the requirements of their contract; *as to which one the evidence is more or less conflicting,* and that is the question which you are to determine. The party that failed to keep its contract, which failure resulted in

> loss to the other, is under the law to be mulct in damages. That is the whole sum and substance of the case, Who was responsible for the failure to have this contract carried out?" (p. 189.)

It will be noted from the foregoing, that the lower Court does not agree with the appellant in the idea that the evidence upon that question "is uncontradicted," but expressly states that upon that question there is more or less conflict.

The charge of the Court contains a fair statement of the case so far as the issues in the lower Court are concerned, and a reference thereto serves every purpose on this appeal in answer to what appellant offers as his statement of facts on the appeal. It will also appear in said charge, that instructions in accordance with what appellant claims to be the law relating to "anticipatory breach," (Brief, pp. 29-35) were given by the Court, in connection with a fair statement of the facts of the case to which that principle was to be applied. (Rec. pp. 181-185.)

It is our idea, however, that a statement of facts on an appeal should be an outline of the issues presented by the appeal, and it is to the issues so presented that we shall address ourselves.

I.

INSTRUCTIONS OF THE COURT ON THE QUESTION OF DAMAGES.

1. IF ERROR, IT IS HARMLESS ERROR.—It will be noted that while the assignment of errors is somewhat broad, the discussion in the plaintiff's brief is principally addressed to but a single subject, namely, a criticism of the instructions of the lower Court on the question of damages. That is a question, however, to the consideration of which, it is evident from the record, the jury never arrived. Hence, it would seem that it becomes immaterial upon this appeal whether the instruction be right or wrong, because, if error, not being passed on by the jury, it is harmless.

We note the concession in appellant's brief (pp. 20-21) that,

> "It is, of course, fundamental that an appellate Court cannot speculate upon the grounds which underlay the verdict. No one can say in what manner or by what process of reasoning they reached their conclusions. They are necessarily presumed to have followed the instructions of the trial judge, and if they were erroneous the judgment must be reversed unless it appears beyond all doubt that the error did not and could not have prejudiced the rights of the complaining party."

In attempting to apply this principle to its advantage on this appeal, appellant continues:

> "In the case at bar, the jury may have decided that the plaintiff was entitled to damages only on the basis of the first generator delivered and installed. *They were told that the plaintiff could recover nothing on this account.* If that instruction was erroneous, its prejudicial effect is plain."

Such being the basis upon which the appellant founds his contention that the instruction, if erroneous, was preju-

dicial, we need go no further in the consideration of the subject, for the statement that "they were told that the plaintiff could recover nothing on this account" is not borne out by the record.

The jury *was not* told, as appellant assumes, that plaintiff *could recover nothing on account of the first generator.* On the contrary, the jury was told that plaintiff *could* "recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of the delivery and installation thereof, and the necessary steps to have it returned to it, together with such profit as it would have realized on its sale had the contract been fully executed." (Rec. pp. 185-86.)

The argument, therefore, that the instruction as to damages with respect to the first generator, debarred the jury from giving *any damages* on this account to plaintiff, and that hence a verdict for the defendant may have been based not upon a finding of a breach of contract by plaintiff, but upon a finding that they failed to prove any damages, necessarily falls to the ground.

This applies with equal certainty to the statement in the brief that

> "Plaintiff adhering to its conception of the measure of damages, offered no evidence upon the theory stated by the Court—such as expense of installation or removal."

It certainly offered evidence of the expense of putting the cables and bed-plate in. (Rec. p. 160.) It also offered evidence of the reasonable cost of installation of the second and third generators, and the permanent switchboard. (Rec. p. 159.)

So we see that whether or no the instruction respecting damages be erroneous, it still left sufficient room for a verdict for the plaintiff in case it was otherwise entitled to recover. By the instruction the jury were not "enjoined from giving the plaintiff a verdict," but it only limited the amount of such verdict.

So far as the counter claim is concerned, that is an entirely different matter, because, as is admitted by the appellant, before that could enter into the consideration of the jury, *they must have found the appellant in fault.* In the language of appellant,

> "It may be that under the instructions as to the measure of damages governing the respective parties, the jury found them both in some degree of fault," etc. (Brief, pp. 21-22.)

Having found the plaintiff in fault, the question of its right to recover damages is eliminated, and hence an instruction upon the question of damages, if erroneous, is nevertheless immaterial.

We think, therefore, the preliminary suggestions in plaintiff's brief by means of which he desires to establish that the alleged error in the instruction regarding the damages, would not be harmless error, has no foundation.

2. THE INSTRUCTION WAS NOT ERRONEOUS. PLAINTIFF ELECTED TO RETAIN TITLE TO THE GOODS, NOT ONLY BY THE FORM OF HIS ACTION, BUT ALSO BY HIS ACTS LONG BEFORE THE ACTION WAS BROUGHT.

As a matter of fact the instruction was not wrong as applied to the case attempted to be made by the plaintiff.

In its criticism of the instruction, the plaintiff wrests the particular language criticised from the rest of the instructions, and from the rest of the case, and attempts to apply to it legal rules applicable to an entirely different state of facts.

The instruction complained of refers to the provision of the contract by which title to the generators was retained by the plaintiff, and begins as follows:

> "On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to *actually consummated.*"

The Court then refers to the terms of the contract by which it is provided that the property shall not pass, and concludes:

> "If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff, or any part thereof, since it remains its property and there is no evidence that it was lost or injured, but it will only be entitled to recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of delivery and installation thereof, and the necessary steps to have it returned to them."

The plaintiff's proposed instruction, which was refused, covers the same subject matter, and hence should also be considered in this connection. It is as follows:

> "But so far as this case is concerned, the insertion of this provision in the contract gave the defendant *no more or greater rights than if it had been omitted,* and should, therefore, *be wholly disregarded* by you in rendering your verdict."

With respect to the *second and third generators*, the Court instructed the jury that they were not shipped, and were subsequently sold by plaintiff. So far the instruction could not be objected to, because it is admitted by the plaintiff. The Court then proceeds:

> "As to those machines, therefore, if you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them."

In this connection, the plaintiff had requested an instruction, which was refused, that the measure of damages suffered by plaintiff was the contract price for the entire installation, less the market value of the second and third generators at Portland, less the value of component parts of the switchboard at said time, less the freight charges on the switchboard to Portland, and less the cost of time, labor and materials necessary to erect the second and third generators, and which said requested instruction concluded with the following:

> "The balance is the amount of damages suffered by the plaintiff. *Whether or not plaintiff received more than the cost of building the second and third generators* at a sale to another party *is utterly immaterial.*"

So far as concerns the refusal to give the two above requested instructions, we do not think much need be said. To have given them would have been plain error, no matter what construction is proper to be placed on the contract.

Returning, now, to the instruction given by the Court upon the question of damages as affected by the state of the title to the goods:

That instruction is criticised on the ground

> "That the provision in the contract above referred to is for the benefit of the seller, who may either enforce it or waive it or proceed as in the case of an absolute sale." (Brief, p. 23.)

To use the language of appellant's brief, "The seller is put to his election; the choice of one remedy is an abandonment of the other. Accordingly, *an action upon the contract for the price* of the article is held to vest the title in the purchaser."

In support of this, he cites authorities from which he quotes, which, being accepted for what the appellant claims for them, are to the following effect:

> "The plaintiff could either recover the property or *sue for the purchase price.* But the pursuit of one remedy necessarily excludes the other. It was not entitled both to the purchase price and the property." etc.

Appellant then concludes:

> *"The commencement of this action constituted plaintiff's election.* Upon such waiver the rule of damages ordinarily controlling in the case of a breach of a contract of sale became applicable. Under the facts here the plaintiff could recover *either the reasonable value of what it has delivered and installed,* or the contract price with proper deductions on account of those particulars in which the contract remained to be performed at the time of defendant's repudiation. The complaint was framed so as to *present both theories.* The first count pleaded partial performance of the contract by the plaintiff, readiness and ability to perform completely, and defendant's failure to pay and repudiation. The second count was in *indebitatus assumpsit,* for the value of the materials furnished." (pp. 26, 27.)

There seems to be more than one answer to this attempted application of the rule to the facts of this case.

(a) In the first place, does it not appear *on the very statement of the case by the appellant* that he has not brought himself within the legal rights vouchsafed to him by the decisions mentioned?

Here he attempts to substitute an entirely different action from the one which the law says constitutes an election to confer the title. Both counts sound in *damages* for breach of contract. *Neither count is for the purchase price.* An action for the recovery of the reasonable value of *part of the property* delivered and installed, is not an action for the purchase price under this contract, which is an entirety. Neither is the action for the purchase price with the deductions specified, an action for the purchase price. It amounts to saying that plaintiff would retain the goods sold, and give the defendant credit for what is saved to plaintiff by not delivering and installing them. The purchase price represents the value when installed, and the deductions from that purchase price of the cost of installation, as proposed by plaintiff, leaves in the hands of plaintiff the value uninstalled, which value is in the goods retained by him. So his proposed instruction, as well as the action brought, is based on a reservation of title in the plaintiff.

Having alleged that he had partly performed, and was able, ready and willing to complete performance, he should have tendered the property to us and claimed the full purchase price. No title could pass to us by his retention of the property and a claim for the difference between value and the purchase price as damages.

Neither is an action of *indebitatus assumpsit* for the *value* of *materials furnished,* which are only a part of the materials contracted for, in a contract which is an entirety, "an action *upon the contract* for the *purchase price.*" Suing for "the reasonable value" is not a suit for the purchase price, and *indebitatus assumpsit* ignores the contract. Besides, the second count does not state an action that would lie under the facts of this case.

> "Where a special contract is still *open*, and has not been rescinded by *mutual consent,* it is necessary to declare specially."

And the common count in such case is insufficient.

BARRERE VS. SOMPS, 113 Cal. 97-*101.*

Hence, on his own statement, plaintiff has in the "commencement of this action," elected to retain the title under the provision of the contract under consideration.

(b) But in this case plaintiff made its election against the passing of the title before he began his action.

The evidence shows that *before action was brought*, the plaintiff *had sold the other two generators* in question, (p. 146), and *had dismantled the switchboards* and turned them back into stock. The plaintiff never delivered the principal part of the appliances, nor did it keep itself in readiness to deliver.

These acts are necessarily inconsistent with any title to the goods in the defendant, and determine the plaintiff's election with regard to all of the property covered by the contract, for it is conceded that the contract was an en-

tirety. All of the generators, switchboards, and accessories, were sold for a lump sum, to wit: $7,850.00. (Rec. p. 4.)

The agreement to pay $1,500.00 was not a segregation of or the fixing of a price on the first generator, but a mere payment on account of the gross price of $7,850.00. In the language of the contract:

> "It is agreed and understood that payment in the amount of $1,500.00 will be made *on the total contract price* immediately upon installation and acceptance." (Rec. pp. 2 and 3.)

This fact is recognized by the plaintiff in his correspondence and in the bill of particulars delivered by it, and in his brief on this appeal, where he makes the following statement (p. 27):

> "The agreement in suit was entire and provided for the payment of a single price for complete performance by the plaintiff."

The entire transaction thus shows conclusively the election on the part of the plaintiff to retain the title to all of the apparatus, and to look to the defendant for damages suffered by the alleged breach.

Under these circumstances, the criticism of the instruction which they attack necessarily falls to the ground.

Inasmuch, therefore, as the Court's instruction "concerning the reservation of the title clause" was right, the additional criticism contained in the brief under Article 4 (pp. 27 and 28), also loses its point.

II.

DISCUSSION IN APPELLANT'S BRIEF UNDER POINT 5, CLAIMING "THE EVIDENCE SHOWS WITHOUT CONFLICT THAT THE PLAINTIFF PERFORMED THE CONTRACT." (BRIEF, P. 29.)

Based on the foregoing assumption, appellant refers to "the doctrine of anticipatory breach," and argues that appellee committed the first breach, and therefore upon it rests all the liability for the non-performance of the contract by appellant.

1. We have already indicated that upon this point the Court gave its instructions to the jury. (Rec. pp. 181-185.) With regard to the law relating to what appellant calls "the doctrine of anticipatory breach," the Court instructed the jury in absolute accordance with the request of the appellant (pp. 181-182-183), and left the facts to be determined by the jury, without objection on the part of the plaintiff. We do not see what more favorable instruction the appellant could ask for.

We do not understand that questions of fact submitted to a jury without objection, can be retried in the appellate Court. It cannot be assumed on an appeal that a jury is bound to accept the testimony of any witness, or of any number of witnesses. They are the judges of their credibility, and if there were no other element justifying the submission of the questions of fact to the jury, this element is sufficient. It is, however, an element which the appellate Court is not able to consider upon an appeal.

2. But that is not all. We have heretofore called attention to the fact that there was a conflict in the testimony relating to the question of breach.

It is not our present purpose, nor do we think it necessary to make a close analysis of the testimony for the purpose of exhibiting this conflict. It is enough to suggest that the sufficiency of the generator was in question. That appellant (plaintiff below) claimed that the failure to get the required kilowatts was due to deficiency in the engine, and the respondent (defendant below) claimed it was due to deficiency in the generator, and evidence to support both contentions was introduced.

So, also, in this connection, the question of the sole-plate was involved. The plaintiff admitted that it placed a wooden temporary sole-plate under the generator, and afterwards attempted to substitute a permanent iron sole-plate.

The contract itself did not directly provide for this sole-plate, and a dispute arose as to whether it was the duty of the appellant or the respondent, to furnish it. As evidence that the appellant did not then contend that the contract obligated the respondent to furnish it, we have in proof the appellant's attempt to secure an auxiliary contract with the respondent upon this subject, which was declined. The appellant then, upon the trial, resorted to expert testimony for the purpose of fixing this duty upon the respondent, and called Mr. Hunt to testify that it was the general engineering practice for the engine to furnish the sole-plate. Of course, the jury were not bound to accept the testimony of Mr. Hunt upon this subject, nor, if accepted, was the testimony sufficient to bind the respondent, for there was no evidence that the respondent knew of any such practice or custom.

Appellant's discussion of this subject (p. 30 of his brief), even if it be accepted as it stands, shows sufficient for the submission of the question to the jury.

3. The contention that defendant was guilty of a substantial breach by its failure to pay the $1,500.00 on July 15th, 1910, is also an assumption of fact upon a question properly submitted to the jury. It will be noted that under the contract, the $1,500.00 was only to be paid after the generator was installed *and accepted,* and it never was accepted.

Moreover, the refusal of the respondent to pay the $1,500.00 was never treated by the plaintiff as a breach. On the contrary, the plaintiff continued to urge the payment thereof, and notwithstanding the refusal to pay it, continued in the further installation and testing of the generator. It, therefore, cannot make that a basis for its argument respecting an "anticipatory breach." None of the cases upon which he relies contain this element.

On the other hand, it is a settled principle of law that a refusal by a party to perform his contract must not only be a distinct and unequivocally absolute refusal to perform the promise, *"but must be treated and acted upon as such* by the party to whom the promise was made; for *if he afterwards continue to urge or demand a compliance with the contract,* it is plain that he does not understand it to be at an end."

United States vs. Smoot, 15 Wall. 36;
Hansen vs. Slaven, 98 Cal. 382;
Benj. on Sales, Sec. 568.

4. It is further claimed that defendant's letter of August 25th, 1910, was a repudiation of the contract, and appellant says, "At that time the plaintiff was clearly not in default." (pp. 31-32.)

Whether the plaintiff was, or was not, then in default, is one of the disputed questions of fact, but waiving that for the present, we call particular attention to this letter of August 25th, 1910. (Rec. pp. 139-141.) We claim it was *not* a repudiation of the contract by the respondent. In that letter defendant called the plaintiff to account for his several derelictions in the performance of the contract, and asserted that it appeared to defendant that the only term of the contract which appealed to the plaintiff was that defendant should make a payment of $1,500.00 on July 15th. This is followed with a statement that defendant will not accept any *part* of their machinery *"until you have conclusively proven to us that you have done the work* specified in your contract," etc.

While it is true that defendant further states, "That inasmuch as you have violated your contract with us, the same is void and of no effect," that statement was not intended as a repudiation of the contract, for it is followed with the suggestion to the plaintiff

> "That instead of attempting to collect money from us, which is not due, and in no sense belongs to you, that *you get busy and do the very best you can toward rectifying the broken promises you made to us in your contract of May 25th.*"

Unquestionably the plaintiff did not then construe that as a repudiation of the contract, for Mr. Wernicke testifies that on September 2, 1910, he was informed by Mr.

Head that Colonel Spaulding had ordered the apparatus out of the Spaulding Building, and the defendant had lost their contract.

> "Mr. Head and I were talking over the matter unofficially and I was asked what sort of an arrangement our Company would make to let the Samson Iron Works out of their contract with us, and unofficially I replied that we would probably make every allowance we could and list those machines which were still at the factory on the stock sheet, and endeavor to dispose of them for them, and also help them get rid of the generator that was in Portland, but that we probably would not accept cancellation of the contract." (Rec. 159.)

Subsequently, on September 7th, he received a letter from the defendant, dated September 6th, notifying the plaintiff of the refusal of the Spaulding Company to accept the plant, and that the defendant would hold the plaintiff liable for all loss and damage on that account. And on September 12th, 1910, the defendant notified the respondent that the generator and appurtenances in the basement of the Spaulding Building were awaiting removal by the plaintiff, and concluded:

> "We may needlessly add that we will have no further use for the generators ordered from you at this time." (Rec. p. 179.)

So it will be seen that the attempt to fix "the repudiation by the defendant" as of August 25th, 1910, is at least, under the evidence, open to question, if not in fact absolutely unfounded. The least that can be said for it is that it presented a question for the jury, and since the verdict is against the plaintiff, the fact must, on this appeal, be assumed against them.

Then, again, with respect to the date when the two generators should have been delivered, the appellant says:

> "The contract provided for the delivery 'from our factory in approximately 90 days from date of *receipt of* order, with full and complete information.' The proposal was accepted by the Iron Works May 26, 1910, and the contract was taken by Wernicke to Portland and thence mailed to Pittsburgh. There is no specific testimony of the date of its receipt at the factory, so the Court may *judicially conclude* that the contract arrived there about June 1st. The 90 day period expired August 30, 1910." (Brief, p. 32.)

Here it appears that the appellant is again assuming as an "uncontradicted fact" matter that is open to dispute. Mr. Wernicke was the agent of the plaintiff. He received the order "with full and complete information" on May 26th, 1910. It would seem, therefore, that there is no occasion for resort to "judicial notice" to fix the expiration of the 90 day period, even though "judicial notice" were a proper method of supplying evidence upon this appeal. The 90 day period would, then, expire on August 25th. The repudiation in question was finally and absolutely made on September 12th.

Under such circumstances, was it, or was it not, within the purview of the jury to conclude that the plaintiff was guilty of a breach of its contract with respect to the delivery of the second and third generators before the alleged repudiation by the defendant?

We had not intended to go into so much detail regarding questions of fact, but we cannot refrain from criticising some of the statements made in appellant's brief, though we do not pretend to have treated the matter exhaustively.

III.

ALLEGED INTRODUCTION OF HEARSAY TESTIMONY.

At the end of the brief we find a statement of an alleged error in permitting Mr. Head to testify to a conversation with Colonel Spaulding, at which no representative of the plaintiff was present, on the ground that said testimony is pure hearsay and incompetent.

Let us look for a moment at the facts:

1. We have a cross-complaint which alleges that the plaintiff knew that its contract was to be, and was then and there between said plaintiff and defendant intended to be, an integral part of a contract then about to be entered into between the defendant and said Spaulding. That in consequence of the failure of the plaintiff to perform its contract, defendant was, in turn, prevented from performing its contract with said Spaulding, and that on the 6th of September, 1910, *the defendant informed the plaintiff that said Spaulding had, by reason of the failure* on the part of the said plaintiff to perform *its* portion of said contract, rescinded *his* contract with the defendant, and would hold said plaintiff liable for its loss, and thereafter on September 12th, 1910, defendant rescinded its contract with plaintiff. (Rec. 62 and 63.)

These allegations raised an issue which made the testimony perfectly competent.

2. Moreover, if not otherwise competent, the plaintiff opened the door for its admission by previously calling Mr. Wernicke to testify to the very matter now objected to as hearsay.

In this testimony Mr. Wernicke testifies to what Mr. Head told him concerning the Head-Spaulding conversation, and that as a result, Mr. Head and Mr. Wernicke discussed methods for adjusting the difficulty which Mr. Spaulding's cancellation of the contract had brought about. We will not detail this testimony, but refer to the Record, pages 158 and 159. It will be noted that Mr. Wernicke fixes the date of this conversation as September 2nd, while Mr. Head fixes it as September 6th. (Rec. p. 173.) Which is right the jury determine.

3. Again: Mr. Head's testimony respecting the Spaulding conversation is introduced as part of what Mr. Head told Mr. Wernicke, the plaintiff's agent. He is not testifying to it as an independent fact. After relating the conversation with Colonel Spaulding, he continues:

> "That was preceding the conversation with Mr. Wernicke. I then told Mr. Wernicke about it, and I told him that the way they had held off the work there it had forced Colonel Spaulding to cancel the contract on us," etc. (Rec. p. 172.)
>
> * * * * * * * *
>
> "That entire transaction took place on the same date. The conversation with Mr. Wernicke was in the basement, and that with Mr. Spaulding in his office upstairs in the same building." (Rec. p. 173.)

Such testimony is not subject to objection as hearsay.

JONES ON EVIDENCE, Secs. 300, 344, et seq.

4. And once again: Mr. Wynn, Mr. Spaulding's superintendent, had testified on behalf of the plaintiff as to what he understood was the reason Colonel Spaulding directed the Samson Iron Works to remove their machines from the building. (Rec. pp. 150-151.)

Why, then, was it not competent to introduce evidence in contradiction to Mr. Wynn's statement, showing exactly what Colonel Spaulding had to say upon the subject?

Appellant seems to recognize the effect of the introduction of Mr. Wynn's testimony upon the question here under consideration, and attempts to parry it with the suggestion (Brief, p. 37):

> "Of course, the presence of this testimony in the record did not *render harmless* the admission of Colonel Spaulding's statement. It cannot be conclusively presumed that the jury made the analysis of the evidence necessary to reach the conclusion just demonstrated."

But the question now before the Court is not whether or no Mr. Wynn's testimony "rendered harmless the admission of Colonel Spaulding's statement." It is whether or no the presence of that testimony rendered the latter admissible. Upon this question it would not seem that there can be much doubt, as it is plainly in rebuttal of Mr. Wynn's testimony.

We are confining our argument to matters raised in appellant's brief, as we assume all other alleged errors are waived.

We respectfully submit that the appeal should be dismissed.

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